No. 10675

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellants

Appeal from the District Court of the United States for the District of Idaho, Eastern Division

H. B. THOMPSON,
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STATEMENT

A full statement concerning jurisdiction, questions presented, and other preliminary matters, including a statement of facts, is set forth in appellants' brief and also in appellee's brief, and we will not here restate them but will confine our discussion herein to answer appellee's brief. There is very little if any disagreement between the parties as to the facts involved, and the questions presented, of course, involve only questions of law, upon the facts of the case.

ARGUMENT

We shall answer appellee's brief in the same order it has set up its argument and by using corresponding numbers.

I.

Negligence

A. Appellee naturally relies upon the previous decision of this court to sustain the trial court's action with reference to negligence.

> United States vs. Oregon Short Line R. Co., 113 Fed. (2d) 212.

In that case the only question before the court and the only question which it decided was whether or not in an action of this kind it is necessary to allege and prove negligence, and the court held it was not necessary to do so. We have preserved our record in this case and ask the court to review its previous holding in this respect, for the reasons set forth in our opening brief, pages 40 to 50 inclusive.

This question is involved in and will be discussed in connection with the next point, to-wit: promixate cause.

Proximate Cause

B. The agreement between the Government and the Indians was quite clearly premised upon two grounds. One, which related to the terminal of the railroad and the townsite of Pocatello, and the other, to the right of way for the Utah and Northern Railway Company through the reserva-

tion (R.51). It is the right of way through the reservation with which we are concerned in this case, and this part of the agreement was "to ascertain and fix the compensation" to be paid to the Indians for land being occupied by the Utah and Northern Railway Company (R.51), the consent to the use and occupation thereof by the Indians "had not been formally obtained" (R.52). The lands so acquired by the railroad company were by the "agreement relinquished to the United States for the use of the Utah and Northern and the Oregon Short Line railroads," (R.53), for which the railroad paid the sum of $8.00 per acre. On the same page of the record the report says:

> "In this age of progress it is impossible, and it certainly is not desirable, to hinder the building of railroads by blocking the natural routes by great reservations for Indians *or for any other purpose.* Every part of our country must be brought in communication by the best means with every other part, and when the railroad companies ask nothing but the right of way they should have it in the interest of the people." (Italics ours.)

No where does the intention appear that there should be any different legal relation between the railroad and the Indians concerning this right of way than the legal relations existing between the railroad and the white people whose lands the railroad crossed, except that of furnishing an indemnity bond for the payment of "any and all damages which *may* accrue." The purpose of the agreement was to legalize the occupancy of the land held by the railroad for right of way purposes and to fix the compensation therefor. We sub-

mit that nothing further can be established by the agreement, or the law enacted approving the agreement. 25 Stat. L 452 (Appendix "1" of our opening brief).

The report further says that

> "this land is now of no benefit to them, and the money for which it is to be sold can be most usefully and profitably invested for them in irrigating ditches, harnesses, cattle, wagons and implements, wheat, etc."

The only difference between acquiring this right of way across the reservation and that across privately owned lands is that in the one case it relates to Indians and in the other to white people. As to reservations, the railroad had to obtain the consent of the Indians and as to privately owned land outside the reservation the railroad had to obtain the consent of the white people either by agreement or through eminent domain proceedings, the effect or consent of either being the same.

The fact that the Government and the Indians conferred and made an agreement shows that the Indians were not incapable of understanding their rights, and we know that even the "primitive" Indian was smart enough to know danger when he saw it, and we dare say he knew that when these trains crossed his reservation he must yield the right of prior passage to the train and if he did not do so he might be killed or seriously injured, and that the danger was not "unfamiliar." It might have been a "formidable" danger, but if it was, and they or the Government wanted to be sure the Indians would be paid damages irrespective of negligence or irrespective of their own actions being the proximate cause, it seems to us

that such a condition would have clearly and plainly been imposed upon the right to a right of way across the reservation.

The rule of liability respecting Indians can be no different whether the accident occurs inside the reservation or outside the reservation, and no apparent distinction is recognized in the agreement. The danger from trains to Indians is just as great in crossing the railroad track outside the reservation as within it, and yet as soon as they leave the reservation they are subject to all of the prevailing rules of law to the same extent and to same effect as white people. If it was the Intention to give them a right of action and protect their interests irrespective of negligence or proximate cause because of threat of "unfamiliar and formidable dangers" arising from the operation of trains it would seem that such protection would have been extended to them wherever they may cross a track, whether inside or outside the reservation. It certainly was never intended that they might recover for suicidal acts or for failure on their part to exercise care for their own protection, which they utterly failed to do in the case at bar. No such intent was even hinted at in either the statute or the agreement approved by the statute, or by the bond executed by the appellants, and clearly such an intent was not "within the contemplation of the parties at the time of the execution of the bond."

> *American Surety Company vs. Wheeling Structural Steel Company,* (4th Cir.) 114 Fed. (2d) 237, and cases cited therein;

Also *15 Am. Juris.* 451-453, wherein it is said:

> "A common statement of the rule is to the effect that the damages recoverable for breach of a contract

> are such as may reasonably be considered as arising naturally from the breach of the contract itself, or such as may reasonably be supposed to have entered into the contemplation of the parties when they made the contract."

In the case at bar there was first, no breach of the bond by the railroad company, and secondly, it was not in contemplation of the parties when the contract was made or the statute passed approving the agreement between the Government and the Indians that liability would attach to the railroad company irrespective of negligence on its part, and certainly not when it was lawfully operating its train and the accident could not have been avoided by it but could and should have been avoided by the occupants of the truck if they had looked or listened for the train.

Appellee cites *Alaska Pacific Fisheries vs. United States,* 248 U. S. 78, and *Choate vs. Trapp,* 224 U. S. 66, to the effect that the statutes for the benefit of Indians must be liberally construed, keeping in mind the "situation and needs of the Indians and the object to be obtained."

The object to be obtained in the case at bar was the granting of a right of way and the payment of compensation therefor. There was nothing in the contract with the Indians concerning the giving of a bond.

The case of *Hannibal, etc. Railway Company vs. Packet Company,* 125 U. S. 260, is also cited, which, together with the other two cases we think were clearly distinguished in our brief in the prior case (113 Fed. (2d) 212) at pages 18-20 and 23. As between the Government and the Indians it is the

undoubted rule that statutes are to be liberally construed in favor of the Indians, but those cases do not hold and none can be found which do hold that the same rule ought to be applied to persons or corporations such as appellants. There was full consideration passing between the railroad and the Government representing the Indians and the Indian's rights were "jealously guarded and protected" when the railroad paid for the lands (the purpose of the agreement), and posted the bond to secure the Indians "indemnification" if any of their legal rights were violated and they were entitled to recover.

II.

The acts of the Indians were the sole proximate cause of the collission.

The proximate cause of the collision was nothing the appellants did or did not do, but was the positive and unequivocal acts of the driver or occupants of the truck in driving or permitting it to be driven upon the track immediately in front of the approaching train. The stalling of the automobile on the track cannot be considered an intervening cause, and there was no unbroken sequence which relieved the Indians of their primary duty, for the act of the Indians was continuous from a point of safety where the truck should have been stopped to permit the train to pass up to the time it was stalled on the track; their duty was to avoid danger before getting into it.

> "Death resulted because deceased most unfortunately drove her car in front of this train, which had a right to be on the track, and could travel no other

> place, which being at that point, at that time, could not have helped but strike deceased, and when she had herself proceeded to the place of danger.
> * * * *
>
> "It is alleged that if she had attempted to stop after her view was no longer obstructed, she would have been unable to do so in time to avoid the collision, owing to said slippery condition 'and was confronted with an emergency.' *Deceased created the emergency*, and this was not effectively looking and listening when in a place of safety, nor making careful observation to ascertain whether she could safely proceed before going upon the track." (Italics ours.)
>
> *Whiffin vs. Union Pacific R. Co.*, 60 Idaho 141, 89 Pac. (2d) 540.

The accident was not inevitable because if the Indians had heeded the train approaching within plain view and taken no chances, there could have been no risk of injury either with or without the motor stalling.

This was not an "inevitable accident." There is no dispute upon the facts as to what these Indians did or did not do as they approached the crossing, and we think that it must be conceded that by proper action on their part the collision could and should have been avoided and that it could not have been avoided by the appellant. The Indians never knew the train was approaching until the front of the truck reached the first rail, when Helen Toane shouted "here comes a train" (R.155) and then the auto stalled (R.188). The striking of the car by the engine followed immediately.

The facts are undisputed that the train's headlight was

burning brightly, the whistle was being sounded and the bell was ringing (R.172, 178), and as soon as the auto came up to the track and stalled everything was done by the engineer to avoid a collision (R.174-179). The collision could not have been avoided by the engineer (R.181). The train had the prior right of passage and was not required to stop or reduce its speed until the operators of the engine discovered that the driver of the truck was not going to stop before reaching the track and was not going to accord the train the right of way.

McIntire vs. Oregon Short Line RR Company, 56 Idaho 392, 55 Pac. (2d) 148;

Whiffin vs. Union Pacific RR Company, 60 Idaho 141, 89 Pac. (2d) 540.

It cannot therefore be claimed that the proximate cause of the collision came from any act or failure to act on the part of the appellants or their agents, servants or employees, but on the contrary the failure of the occupants of the truck to perform the duty imposed upon them constituted the sole proximate cause.

The case of *Cottam vs. Oregon Short Line RR Company* (Utah) 187 Pac. 827, cited by appellee, is clearly not in point, for there the jury found on conflicting evidence that the engineer was not maintaining any lookout, and if he had been the "operators of the engine could have stopped the same before reaching the place of accident." In the case at bar the evidence is to the contrary and is undisputed.

Reiss vs. Pa. R. Co., 107 Fed. (2d) 385, likewise is not

in point. In that case plaintiff's complaint was dismissed by the trial court and that action was affirmed by the court of appeals, in which the court said:

> "* * * If we * * * assume that the truck did become motionless on the crossing, we find no basis for the further inference that the truck was in that position long enough for the engineer to have observed it and stopped the train short of the crossing."

Hull vs. Seattle R & S. Ry. Co. (Wash.) 110 Pac. 804, is not in point, for in that case it appears that the track was straight for 400 to 450 feet and the automobile stalled on the track could have been plainly seen for that distance, and the train

> "* * * could have been stopped, as the motorman himself says, within a distance of from 160 to 170 feet; that when the car became stranded, and the passengers sought to attract the attention of the motorman to its position, the motorman was not at the motor, and did not reach it until the train had approached to within 60 feet of the automobile, too late to materially check its speed before it crashed into the car."

The case of *Central of Ga. Railway Company vs. Faust*, 82 So. 36, is also clearly distinguishable, for it shows excessive speed on the part of the train due to the fact that the crossing was so situated that the trainmen could not see the auto until it was within 10 or 15 feet of the track and the driver of the auto could not see the train until the auto was within ten feet of the track; the train approached the crossing at a high rate of speed and without giving the statutory signals and "by

reason of this fact and attending circumstances he lost control of the car and was thereby put in a position of peril by reason of the defendant's negligence." No such a situation exists in the case at bar.

Instructions

Appellants' requested instructions 7 and 9 were correct and should have been given for the reasons set forth on pages 27-33, incl. of our opening brief. The requested instructions were not misleading but correctly informed the jury as to the duties of a traveler approaching and about to cross over a railroad track. They defined the driver's duties in this case as set forth in *Whiffin vs. UPRR Co.*, supra, and also the rights of the operators of the locomotive, *McIntire vs. OSLRR Co.*, supra. The rules of law set forth in those decisions are rules of ordinary care which the traveler must obey or be denied a recovery.

> "* * * what will constitute ordinary care in such a case has been precisely defined, * * *. In this special case the amount of care as well as the nature of it has been settled."
>
> *Whiffin vs. UPRR Co.*, supra.

To the same effect:

> *Koster vs. Southern Pac. Co.*, (Cal.) 279 Pac. 788, 793;
>
> *Shortino vs. Salt Lake U. R. Co.* (Utah) 174 Pac. 860, 867;
>
> *Wilkinson vs. Railroad* (Utah) 99 Pac. 466;
>
> *Nuttal v. Denver, RGWR Co.*, 99 Pac. (2d) 15.

The cases cited by appellee are not in point, because in this case the evidence is undisputed as to the conduct of the driver and the other occupants of the truck; that they failed to look and listen is clear, for had they done so before reaching the track they could have both seen and heard the train and stopped the truck before getting into a zone of danger, and the accident would not have occurred.

> "* * * we are dealing with a *standard of conduct,* and when the standard is clear it should be laid down once for all by the courts." (Italics ours.)
>
> *Baltimore & Ohio R. Co. vs. Goodman,* 275 U. S. 66, 70;
>
> Also *Southern Pac. Co. vs. Day* (9th Cir.) 38 Fed. (2d) 958, 960.

The court should have granted appellants' motion for a directed verdict, but not having done that should have given the jury these requested instructions, for there were no other instructions given which told the jury what constituted proximate cause except that contained in the abstract definition thereof. No where in the court's instructions was there any statement of law concerning the traveler's duty as he approached and was about to cross over the tracks.

III.

Funeral expenses are not recoverable.

The case of *Jutila v. Frye* (9 Cir.) 8 Fed. (2d) 608, and *Hartman v. Gas Dome Oil Co.,* 50 Idaho 288, 295 Pac. 998,

cited by appellee in support of its proposition that funeral expenses constitute a proper element of damages are based upon an Idaho statute giving a right of action for death by wrongful act and providing

> "* * * in every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." *Section 5-311 Idaho Code Annotated, 1932 Edition.*

An examination of the decisions cited in the note to *17 C. J. 1338,* cited in *Jutila v. Frye,* supra, will show that those decisions dealt with statutes which were broader than the statute now before the court, and the similar Federal Statutes involved in the Federal decisions cited in our opening brief on page 39, and the interpretation of the Idaho statute or the rule applied thereto cannot, of course, stand against the rule of unanimous decisions of the Federal courts in construing the Federal statutes.

Appellee saw fit to base its action upon Section 14 of the Act of Congress (25 Stat L. 452), and not upon the Idaho statute referred to. It is accordingly clear that decisions under the Idaho Act are not controlling on this point. Section 14 refers to "damages which may accrue," and the Federal Employer's Liability Act (45 USCA 51) says that the railroad "shall be liable in damages." Under the latter act funeral expenses are not a proper element of damages and are not recoverable. As one statute is no broader than the other, the decisions cited on page 39 of our opening brief are controlling.

IV.

The evidence does not support the verdicts for the deaths of Ninip and Helen Toane.

Whether we term the excessive verdicts in this case as having been arrived at through passion or prejudice, or through some other means, the result is the same, for there is no competent evidence to support them. The only method by which the jury could have returned verdicts in the two death cases was to disregard entirely the instructions of the court and arrive at some amount without factual or legal basis. The jury was told that recovery was limited "to the reasonable expectations of pecuniary benefits to particular individuals" (R.199) and "elements of damages within the realm of possibility but not fairly shown to be reasonably probable do not form the basis for an award of damages" (R.200).

As to Helen Toane:

During her lifetime Helen Toane gave her mother "maybe better than a hundred dollars. *She really doesn't know.*" (R.122). That will support a verdict for no more than $100.00 for the death of Helen Toane. If during her lifetime she contributed only $100.00, it can't be said that she would contribute more than that during her lifetime if she had lived and that of her aged mother, for her mother had approximately reached the end of life's normal span. Even this amount is speculative for Mrs. Weiser's answer as to the amount was that "she really didn't know."

As to purchase of groceries. *Sometimes* she bought her mother $20.00 worth of groceries (R.122). The frequency

of such purchases was finally summed up by Mrs. Weiser as follows: "She said about every two months *sometimes.*" (R.123). That might mean that in two months time she might spend $40.00 for groceries and then months and even years might elapse before she would make another purchase. A verdict of $1,250.00 therefore could only be based upon the purest guess or speculation and without any competent evidence as a basis.

As to Ninip Toane:

The only evidence is that given by his aged father, which during his lifetime Ninip Toane "contributed very little" (R.170). No one can even guess or speculate under such testimony what Ninip Toane's father suffered pecuniarily as a result of his death. It will support no amount. The cases cited by appellee are based generally upon the Idaho statute, not applicable in this case, and similar statutes, and accordingly they are not in point. Some are also personal injury cases which also present a different measure of damage.

As shown under point III above, the statute involved does not authorize damages for funeral expenses, and the recovery for death is limited to pecuniary loss, of which none is shown.

Verdicts based upon substantial evidence and not influenced by passion or prejudice will be sustained but verdicts such as those in this case that are arbitrary, capricious and inconsistent will not be upheld.

> "It is true that a jury does not have the power to render a capricious and arbitrary verdict in total dis-

regard of the evidence and that the verdict must be consistent with some legal theory of the evidence."

Gay, Sullivan & Co. vs. Glaser, Crandell Co. (7 Cir.) 102 F. (2d) 149.

And the verdict must be based upon evidence reasonably probable.

"Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth."

Olson v. United States, 292 U. S. 246, 257.

See also Michigan C. R. Co., vs. Vreeland, 227 U. S. 59.

Accordingly, the finding of the jury that the beneficiaries of Helen and Ninip Toane suffered pecuniary loss finds no support in the record.

Union Pacific R. Co., vs. Stanger, (9. Cir.) 132 Fed. (2d) 982, 984, 985.

The judgment of the trial court should be set aside and the court instructed to enter judgment for the appellants.

Lowden vs. Bell (8 Cir.) 138 Fed. (2d) 558, 560, 561.

Respectfully submitted,

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